

SP92

REVIEW OF CRIMINAL LAW PRACTICE EXAM

The exam question states that there are two defendants, Sam and Sharon. Sam is charged with three offenses, murder, aggravated robbery, and criminal trespass. Sharon is charged with theft by receiving and concealing stolen property and unlawful possession of a firearm. The question indicates that the crime occurred in Austin, Texas, so the applicable law is that of the Texas Penal Code.

The most efficient way to organize an exam answer for this question is by offenses. That is, it is easiest to first address the offenses with which Sam is charged: murder, aggravated robbery, and criminal trespass.

The murder case against Sam will be difficult for the State. First, Sam lacks the intent to kill. The given facts support this conclusion by telling us that Sam inquired into whether the weapon was capable of firing because he wanted to reduce his chances of serving time if caught. Further, you are told that the gun discharged after being dropped on the counter. These facts support the defense contention that Sam lacked the intent to kill. It is clear, however, that Sam did intend to commit aggravated robbery. That is, he intended to commit a theft by the use of a deadly weapon. Because of the broad transferred intent provisions of the Texas Penal Code, it is possible to transfer his intent from the robbery to the killing. At common law this could

be much more difficult as the crimes may be "unlike." Even if the crimes are unlike, the State may be able to establish to the satisfaction of the jury that the killing of the store clerk was foreseeable because the robbery was committed with a deadly weapon. Sam's argument to counter this will be that he took steps to insure that the weapon was not capable of firing.

Sam's lack of intent comes from a mistaken belief regarding a fact in the case. He believes that the gun cannot fire. Therefore, he may attempt to assert mistake of fact as a defense. Note that in Texas, mistake of fact is a defense and not an affirmative defense. The elements of the mistake of fact defense are that the actor entertained an honestly held belief which, if true, negated his culpability and which was objectively reasonable. In this case, the honestly held belief of Sam was that the weapon was incapable of firing because it had no firing pin. If true, this circumstance would negate his culpability for the murder because he could not have intended to fire the pistol at the store clerk. The remaining question, and the most important one, is whether the mistaken belief was reasonable. The owner of the pistol told Sam that it was incapable of firing, and a reasonable person might have relied on the representation of the owner. On the other hand, it was easy to confirm that the pistol had no firing pin but Sam did not do this. In at least some cases, failure to verify an easily verifiable mistaken belief as to circumstances renders the belief unreasonable.

Sam's defense does not turn entirely on lack of culpability. He might also assert that the conduct was involuntary. Since he dropped the pistol and it discharged when it hit the counter, he may claim that the act was involuntary and could not form the basis for criminal responsibility.

Finally, Sam might attempt the affirmative defense of mistake of law. He was told by a lawyer that the robbery would be aggravated only if the deadly weapon used in the crime is capable of firing. If mistake of law were successful for Sam as a defense, he would nevertheless be guilty of robbery, but he would escape the more serious crime of aggravated robbery. However, he is unlikely to prevail on his defense. Because mistake of law is an affirmative defense, Sam must establish by a preponderance of the evidence that his mistaken belief regarding the law was objectively reasonable, that it was based on a writing, and that it came from an authoritative source. While it may have been reasonable for Sam to believe the representations of the attorney, an attorney in private practice is not the kind of source recognized for the mistake of law defense. Moreover, the opinion from the attorney was not in writing. Sam might prevail by claiming that his conduct was justified under § 9.21 of the Texas Penal Code in that he reasonably relied on the lawyer's advice and therefore believed that his conduct was authorized by law. While this particular fact situation does not work well with the language of the public duty defense, he is more likely to prevail with this defense than with the defense of mistake of law.

Sam was also charged with aggravated robbery and criminal trespass. With the possible exception of the mistake of law affirmative defense, Sam has no real defense to the aggravated robbery charge. Criminal trespass is not included within the crime of robbery, although it is a lesser included offense of burglary. Since aggravated robbery and criminal trespass are not the "same offense," Sam might be convicted of both of those offenses as well as the murder. If he is, lacking a general rule of lenity in Texas, the sentences could be cumulated. Sam does have a good defense to the charge of criminal trespass because he entered a jewelry store then opened to the public. While the owner of the store had not effectively consented to his entry for the purpose of committing a robbery, he was not trespassing on the premises at the time. On the final examination you would have been given the criminal trespass statute as well as the robbery and murder statutes to assist you in answering these questions.

Sharon has been charged with theft and unlawful possession of a firearm. If she received stolen property, knowing it was stolen, she is guilty of theft. She may assert that she did not know the watch was stolen but a jury might infer her knowledge from the fact that the watch was readily identifiable as an expensive watch and had a price tag attached to it. Since it was given by Sam in exchange for cab fare, the jury might infer that Sharon subjectively knew the watch was stolen. Remember that Texas, unlike the Model Penal Code, does not recognize willful blindness as a substitute for subjective knowledge.

The prosecution would undoubtedly attempt to use the presumption of knowledge that arises from possession of recently stolen property. The possession must be unexplained, but Sharon's explanation for her possession of the property would be unlikely to convince a jury that she was unaware that the property had been stolen. If this presumption were given to a jury, it would be given in permissive form to conform with the requirements of Texas law.

Regarding the possession of the pistol, Sharon will have some difficulty defending herself. Possession requires the prosecution to prove beyond a reasonable doubt that the defendant knew the contraband was in her possession and that she knew its character. I would expect Sharon to testify that she did not know the pistol was under her car seat. On the other hand, a jury might infer from the position of the weapon that she knew it was there, and that she was exercising custody and control over the pistol. Because the taxi belonged to her, the State may be able to establish an affirmative link between Sharon and the pistol. Hopefully, fingerprints, registration number, or other identifying characteristics will establish that the pistol belonged to Sam's friend Bill. The State should have no difficulty meeting the second requirement for possession in Texas, namely, that Sharon knew the character of the contraband item.